STATE OF MICHIGAN

COURT OF APPEALS

DONALD MERRY and BARBARA MERRY, Plaintiffs-Appellants,	UNPUBLISHED April 11, 2006
v	No. 258315 Livingston Circuit Court
LIVINGSTON COUNTY ROAD COMMISSION, Defendant-Appellant.	LC No. 02-019480-CZ

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm in part, reverse in part, and remand for further proceedings.

This action arises from plaintiffs' application to Tyrone Township for approval to split their ten-acre parcel of land into two parcels. Plaintiffs intended to have an existing driveway on the property serve both parcels. The township conditioned its approval of plaintiffs' land split on plaintiffs obtaining a shared driveway permit from defendant Livingston County Road Commission. Defendant denied the permit because a hill near plaintiffs' driveway prevented the driveway from meeting defendant's sight-distance requirements (500 feet of unobstructed vision for a shared driveway). The driveway also fell short of defendant's sight-distance requirements for a single-residence driveway (375 feet of unobstructed vision), but plaintiffs were not previously required to comply with this requirement because the driveway was exempt from defendant's regulatory requirements pursuant to MCL 247.327, because it was constructed before August 6, 1969.

Plaintiffs subsequently filed this action against defendant, raising three claims: (1) an appeal from defendant's administrative denial of their request for a shared driveway permit or variance from the sight-distance requirement (Count I); (2) injunctive relief on the ground that defendant lacked jurisdiction over the proposed shared driveway because it was constructed before August 6, 1969 (Count II); and (3) that defendant's denial of a permit violated their constitutional rights to equal protection because other similarly situated landowners had been issued permits. The trial court granted defendant's motion for a protective order and prohibited plaintiffs from conducting discovery. The trial court determined that discovery was unnecessary, because an appeal of an administrative decision is reviewed solely on the administrative record.

The trial court subsequently granted defendant's motion for summary disposition and dismissed each of plaintiffs' claims. This appeal followed.[1]

Plaintiffs argue that summary disposition on Counts II and III was premature, because they were not permitted to develop their claims through discovery. As a general rule, summary disposition is premature if discovery on a disputed issue is not complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). However, summary disposition may be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1994). We conclude that summary disposition was appropriately granted for the equal protection claim and that further discovery with regard to this claim would have been futile, but that summary disposition was premature with regard to plaintiffs' claim that their driveway was not subject to defendant's regulatory jurisdiction.

Plaintiffs' claim for injunctive relief was predicated on their argument that their driveway was exempt from defendant's regulatory jurisdiction pursuant to MCL 247.327, which provides:

> This act shall not apply to driveways in existence on August 6, 1969, except that if the use of the land served by the driveway is changed or expanded, and the change or expansion causes the existing driveway to be a safety hazard, the driveway shall be considered a new driveway subject to this act. . . .

Plaintiffs maintain that their proposed land split would not change or expand the use of the land served by the driveway, and even if it did, the change or expansion would not *cause* the driveway to be a safety hazard.

MCL 247.327 provides that a driveway in existence before August 6, 1969, is exempt from defendant's jurisdiction unless "the use of the land served by the driveway is changed or expanded, and the change or expansion causes the existing driveway to be a safety hazard." Splitting plaintiffs' land to allow a second single-family residence to be built on the land clearly changes and expands the use of the land served by the driveway. We disagree with plaintiffs that the proposed split is not an expansion because defendant permits driveways to serve up to four single-family residences. Although the expanded use is permissible, it is nonetheless an expansion of the driveway's use.

In order to remove the driveway from the exemption provided by MCL 247.327, however, the change or expansion must cause the existing driveway to be a safety hazard. Defendant argues that the parcel split necessarily creates a safety hazard because the driveway will not conform to the 500-foot sight-distance requirement for a shared driveway. Defendant emphasizes that the existing driveway itself fails to satisfy the present sight-distance requirement

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[1] This Court previously dismissed the portion of plaintiffs' appeal challenging the trial court's dismissal of plaintiffs' appeal of defendant's administrative decision, because a circuit court decision on appeal from a tribunal is not appealable by right. *Merry v Livingston Co Rd Comm*, unpublished order of the Court of Appeals, entered November 5, 2004 (Docket No. 258315).

for a single-residence driveway, and that the expansion to a two-residence driveway will create an even greater disparity with the applicable sight-distance standard. Although the trial court agreed that the sight-distance violation established that the driveway expansion would be a safety hazard, we agree with plaintiffs that the mere fact of regulatory noncompliance does not itself establish a safety hazard within the meaning of MCL 247.327.

The statute states that the driveway shall be considered a new driveway, not exempt under MCL 247.327, only if "the change or expansion causes the existing driveway to be a *safety hazard*" (emphasis added). This language requires proof of an actual safety hazard, not merely a regulatory nonconformity, in order to negate the statute's grandfather provision. If the Legislature had intended to negate the grandfather provision every time an expanded or modified driveway failed to comply with an applicable regulation or ordinance, it could have used language to that effect.

We agree, however, that a regulatory violation may be probative evidence of a safety hazard. Under Michigan law, violation of an ordinance or an administrative regulation constitutes evidence of negligence (in contrast to violation of a statute, which creates a rebuttable presumption of negligence). *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 82 n 5; 600 NW2d 348 (1999). It follows that if the violation of an ordinance or regulation may be evidence of negligence, failure to conform to an applicable regulation may serve as evidence of a safety hazard. Thus, defendant can rely on its regulation as evidence that plaintiffs' shared driveway would create a safety hazard, but such evidence is not conclusive and plaintiffs should have the opportunity to offer their own evidence to show that their shared driveway would not actually be a safety hazard, notwithstanding that it does not comply with defendant's regulation.

In order for the driveway to be subject to defendant's jurisdiction under MCL 247.327, defendant must additionally show that the safety hazard is *caused* by the proposed expansion or modification of the use of the land shared by the driveway. MCL 247.327 states that the road commission will have jurisdiction over a previously exempt driveway if the modification or expansion "*causes* the existing driveway to be a safety hazard." It is undisputed that plaintiffs' driveway fails to comply with defendant's present sight-distance standard for a single-use driveway; therefore, any hazard based on inadequate sight-distance is already present, and will not be *caused* by the expansion. Defendant argues that the safety hazard will be aggravated because the standard is higher for a shared driveway, thus creating a wider gap between the sight-distance at the driveway and the regulatory standard. Defendant suggests that the increased safety hazard is self-evident, notwithstanding plaintiffs' argument that the driveway will continue to accommodate only one car's arrival or departure at a time.

The trial court stated that "the driveway does not currently meet sight-distance and clear-vision requirements of defendant; therefore, it is reasonable to hold that expanding the use of the driveway will also increase the risk of traffic accidents." Because there has been no opportunity for discovery and no factual record has been developed, we agree with plaintiffs that this finding is premature. Discovery may lead to information from defendant on matters such as traffic patterns, volumes, or accidents in the county, which could be relevant to determining whether a shared driveway at plaintiffs' location would be a safety hazard. Accordingly, we reverse the trial court's order granting summary disposition on Count II of plaintiffs' complaint and remand this case to the trial court to enable the parties to conduct discovery relevant to the application of MCL 247.327.

We hold that the trial court properly dismissed plaintiffs' equal protection claim. Equal protection of the law is guaranteed by both the federal and state constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 2; *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 259 Mich App 315, 333-334; 675 NW2d 271 (2003). These constitutional provisions are coextensive. *Id.* The doctrine mandates that persons in similar circumstances be treated similarly. *Id.*

Plaintiffs argue that defendant violated their right to equal protection by issuing driveway permits to other homeowners on McGuire Road whose driveways did not comply with defendant's sight-distance requirements. In *Dowerk v Oxford Twp*, 233 Mich App 62; 592 NW2d 724 (1998), the defendant township denied the plaintiff permits to build homes on a private road that did not meet the defendant's standards. *Id.* at 65. The plaintiff alleged that the defendant violated her equal protection rights because it approved another resident's building permit without conditioning its approval on the improvement of the existing private road. *Id.* at 72-73. This Court held:

> [U]nless the dissimilar treatment alleged [in the plaintiff's equal protection claim] impinges on the exercise of a fundamental right or targets such protected classifications as those based on race or gender, the challenged regulatory scheme will survive equal protection analysis if it is rationally related to a legitimate governmental interest. . . . In such cases, the party raising the equal protection challenge has the burden of proving that the challenged law is arbitrary and thus irrational. . . .
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> . . . Plaintiff alleges no disparate treatment infringing a fundamental right or implicating a protected classification, and so the rational basis test applies in this situation. We hold that the restrictions plaintiff challenges result from defendant's exercise of the police power pursuant to ordinary concerns for health, safety, and welfare, and are thus rationally related to a legitimate governmental interest. [*Id.* at 73.]

Here, plaintiffs do not allege that defendant's allegedly disparate treatment infringed a fundamental right or implicated a protected classification. Nor do plaintiffs dispute that defendant's regulations are rationally related to legitimate safety concerns. Accordingly, their equal protection claim fails as a matter of law.

The United States Supreme Court has held that an individual who is neither a member of a protected class, nor a person who claims infringement of a constitutionally protected right, may raise a valid equal protection claim based on differential treatment if he is a "class of one," who alleges that the government intentionally treated him "differently from others similarly situated, and that there [was] no rational basis for the difference in treatment." *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). However, a plaintiff asserting a "class of one" equal protection claim must show that the defendant acted vindictively, and that it exhibited "illegitimate animus" and "ill will"; it is not sufficient to show that one landowner was treated differently from another. *Id.* at 565 (Breyer, J., concurring); *Discovery House, Inc v Consolidated City of Indianapolis*, 319 F3d 277, 283 (CA 7, 2003). Plaintiffs do not allege that defendant acted vindictively or with ill will against them. Therefore, plaintiffs' equal protection claim is invalid as a matter of law, regardless whether they can show that defendant treated similarly situated persons differently. Thus, further discovery with respect to

this claim would be futile. Accordingly, the trial court properly granted summary disposition with respect to the equal protection claim.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michael J. Talbot